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West Virginia's New Grandparent Visitation Statute: A Step in the Right Direction

Michelle M. Price

West Virginia University College of Law

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WEST VIRGINIA'S NEW GRANDPARENT VISITATION STATUTE: A STEP IN THE RIGHT DIRECTION

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I. INTRODUCTION

The average American family has evolved from the nuclear family to its present configuration that encompasses a variety of individuals and relationships.¹ In response to the changing status of the family, state legislatures have enacted laws permitting persons other than parents to petition for custody and visitation of minor children.² Every

1. See Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1992-93).

2. Samuel V. Schoonmaker et al., *Constitutional Issues Raised By Third-Party Access To Children*, 25 FAM. L.Q. 95, 95 (1991).

state in the country has statutory law dealing with grandparent visitation rights.³

The subject of grandparent visitation rights has been a source of controversy in the West Virginia Legislature, and a significant bill had not been passed prior to 1992.⁴ The new statutory framework for grandparent visitation rights is found in sections 1 through 9 of Article 2B, Chapter 48 of the West Virginia Code. While newspaper accounts of the new statute have led the public to believe that this new law has greatly increased the rights of grandparents,⁵ this bill expands grandparent rights only in limited circumstances and falls short of realizing the goal of guaranteeing equitable treatment of grandparents in child visitation statutes. The new statute is a legislative attempt to respond to the West Virginia Supreme Court of Appeals' judicial review of the

3. ALA. CODE § 26-10A-30 (1992); ALASKA STAT. § 25.24.200 (Supp. 1992); ARIZ. REV. STAT. ANN. § 25-337.01 (1991); ARK. CODE ANN. § 9-13-103 (Michie 1991); CAL. CIV. CODE § 197.5 (West 1990); COLO. REV. STAT. § 19-1-117 (Supp. 1992); CONN. GEN. STAT. § 46b-59 (1986); DEL. CODE ANN. tit. 10 § 950 (Supp. 1992); FLA. STAT. ch. 39.4105 (Supp. 1993); GA. CODE ANN. § 19-7-3 (Michie 1991); HAW. REV. STAT. § 571-46 (Supp. 1991); IDAHO CODE § 32-1008 (1983); ILL. REV. STAT. ch. 750 para. 5/607 (1993); IND. CODE § 31-1-11.7-1 (1987); IOWA CODE § 598.35 (Supp. 1992); KAN. STAT. ANN. § 38-129 (1986); KY. REV. STAT. ANN. § 405.021 (Michie/Bobbs-Merrill Supp. 1992); LA. CIV. CODE ANN. art. 9:572 (West 1991); ME. REV. STAT. ANN. tit. 19, § 1003 (West Supp. 1992); MD. CODE ANN., FAM. LAW § 9-102 (1991); MASS. GEN. L. ANN. ch. 119, § 39D (West Supp. 1992); MICH. COMP. LAWS ANN. § 25.312(7b) (West 1992); MINN. STAT. ANN. § 257.022 (West 1992); MISS. CODE ANN. § 93-16-1 (Supp. 1992); MO. ANN. STAT. § 452.402 (Vernon 1986); MONT. CODE ANN. § 40-9-102 (1991); NEB. REV. STAT. § 43-1802 (1988); NEV. REV. STAT. ANN. § 125A.330 (Michie 1991); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West 1993); N.M. STAT. ANN. §§ 40-9-1 to -3 (Michie 1989); N.Y. DOM. REL. LAW § 1072 (McKinney 1988); N.C. GEN. STAT. § 50-13.2 (1987); N.D. CENT. CODE § 14-09-05.1 (1991); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1990); OKLA. STAT. ANN. tit. 10, § 5 (West 1987); OR. REV. STAT. § 109.121 (1991); 23 PA. CONS. STAT. §§ 5311-5314 (1991); R.I. GEN. LAWS § 15-5-24.1 (1988); S.C. CODE ANN. § 20-7-420 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-4-52 (1984); TENN. CODE ANN. § 36-6-301 (1991); TEX. FAM. CODE ANN. § 14.03 (West 1986); UTAH CODE ANN. § 30-5-2 (1989); VT. STAT. ANN. tit. 15, §§ 1011-1016 (1989); VA. CODE ANN. § 20-107.2 (Michie Supp. 1992); WASH. REV. CODE ANN. § 26.09.240 (West 1986); W. VA. CODE §§ 48-2B-1 to -9 (Supp. 1992); WIS. STAT. ANN. § 880.155 (West 1991); WYO. STAT. § 20-7-101 (Supp. 1992).

4. See Mark Paxton, *Senate Oks Grandparents Bill*, CHARLESTON GAZETTE, Jan. 25, 1992, at 5A (quoting Senator Larry Wiedebusch).

5. E.g., Mark Paxton, *Grandparent Visitation Bill Advances*, CHARLESTON GAZETTE, Feb. 2, 1992, at 8A.

prior statutes concerning grandparent visitation. However, the legislature needs to amend the new statute to provide effective guidance to the courts on how to properly deal with grandparent visitation rights.

This Note will first discuss previous attempts of the West Virginia Legislature to expand grandparent visitation rights. These previous attempts include both statutes enacted prior to 1992. Additionally, this background section includes prior case law both before and after the enactment of the prior statutes.

This Note then discusses the statute and implications of its application. Particular focus is paid to the issues that the legislature has anticipated under the new statute as well as other important issues that the new statute is silent upon.

Finally, because the new statute is lacking in clarity as to how the courts should apply its provisions, this Note compares West Virginia's grandparent visitation statute to comparable legislation in other jurisdictions and analyzes how the courts in those states have interpreted their grandparent visitation statutes. The particular laws examined were reviewed by the West Virginia Legislature in the drafting stage of the legislative process.⁶

II. BACKGROUND

A. *The Old Grandparent Visitation Statutes*

At common law, grandparents had no legal rights of access to their grandchildren.⁷ Parents had complete authority to control access to their children.⁸ Grandparent visitation statutes are a recent development in statutory law, virtually unheard of only ten to fifteen years ago.⁹ The first provisions enacted by the West Virginia Legislature

6. File for S.B. 36, LEGISLATIVE COUNCIL OF WEST VIRGINIA, COMMITTEE ON THE JUDICIARY (1992).

7. *Brotherton v. Boothe*, 250 S.E.2d 36, 37 (W. Va. 1980).

8. See Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 118 (1986).

9. See Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 295 (1985).

relating to grandparent visitation were contained in sections 48-2-15 and 48-2B-1 of the West Virginia Code. Section 48-2-15 allowed the court to provide for grandparent visitation as part of a divorce or annulment proceeding involving the custody of minor children. The statute gave the courts the power to:

make such further order as it shall deem expedient, concerning the grant of reasonable visitation rights to any grandparent or grandparents of the minor children upon application, if the grandparent or grandparents are related to such minor child through a party:

(A) Whose whereabouts are unknown, or

(B) Who did not answer or otherwise appear and defend the cause of action.¹⁰

The second statute governing grandparent visitation, section 48-2B-1, formerly read as follows:

Upon the verified petition by a parent of a deceased child seeking visitation rights with grandchildren of the petitioner, the court may order that the grandparent shall have such reasonable and seasonable visitation rights with said grandchild or grandchildren as the court may deem proper and in the best interest of the child or children.¹¹

This section established the right of a grandparent to petition for visitation at any time, not only when a divorce or annulment was being granted. However, this right was limited to the situation where the grandparent's child (parent of the minor child) was deceased.

B. Prior Case Law

The West Virginia Supreme Court of Appeals has seldom dealt with grandparent visitation rights. The court has heard only four cases directly on the subject and those are limited in scope. Two of them were subsequent to the enactment of the prior grandparent visitation statutes.

10. W. VA. CODE § 48-2-15 (1992) (amended by 1992 W. Va. Acts ch. 53).

11. W. VA. CODE § 48-2B-1 (1980) (amended by 1992 W. Va. Acts ch. 53).

The court considered the issue of grandparent visitation prior to the enactment of the first grandparent visitation statute in 1980. In *Brotherton v. Boothe*,¹² after the natural mother died, her parents sought visitation rights with their granddaughter over the objections of their former son-in-law. Denying the relief sought by the grandparents, the court held that a circuit court has no authority to decree visitation rights to a grandparent when the natural parent refuses such rights.¹³ "A parent who properly performs his parental duties has the right to determine with whom his child will associate."¹⁴ Next, in *Jeffries v. Jeffries*,¹⁵ the court, in deciding a child custody case, reaffirmed its position that grandparents had no legal right to visitation over the parent's objection.¹⁶

Subsequent to *Brotherton* and *Jeffries*, the legislature enacted section 48-2B-1 and amended section 48-2-15 of the West Virginia Code.¹⁷ These statutes changed the common law and the West Virginia court's analysis of grandparent visitation rights. These statutes gave grandparents the legal right to visitation of their grandchildren in limited circumstances.¹⁸

The next case involving grandparents and visitation was *Blake v. Blake*.¹⁹ The grandparents had legal custody of their grandchild with the consent of their daughter, the mother of the child.²⁰ Shortly thereafter, the grandparents divorced.²¹ The grandfather was awarded custody of the minor child and the grandmother was granted "reasonable and seasonable visitation" rights.²² When the grandfather refused to honor the grandmother's visitation rights, she sought judicial enforcement.²³ The circuit court found that it did not have the power to

12. 250 S.E.2d 36 (W. Va. 1978).

13. *Id.* at 37.

14. *Id.* at 38.

15. 253 S.E.2d 689 (W. Va. 1979).

16. *Id.* at 690.

17. 1980 W. Va. Acts ch. 24.

18. *See supra* text accompanying notes 10-11.

19. 310 S.E.2d 207 (W. Va. 1983).

20. *Id.* at 208.

21. *Id.*

22. *Id.*

23. *Id.* at 208-09.

grant such rights and that the code set forth no applicable exceptions; thus, the circuit revoked the grandmother's visitation rights.²⁴

On appeal, the West Virginia Supreme Court of Appeals reversed and held that the trial court had not only misconstrued the issue in the case, but also misinterpreted and misapplied the law. The court recognized that the *Brotherton* holding did not apply in this instance because the mother had surrendered her parental rights by consenting to the grant of permanent custody to her parents.²⁵ Also, the natural mother failed to object to her mother's request for visitation rights in this case.²⁶ Because the circuit court misconstrued and misapplied the law, the court ordered the portion of the divorce decree allowing the grandmother visitation rights to be reinstated.²⁷

Finally, in *In re Nearhoof*,²⁸ grandparents sought a declaration that the adoption of their deceased daughter's child by her stepmother would not terminate their statutory visitation rights. Here the court recognized that section 48-2B-1 changed the common-law rule and created an independent right in the grandparent.²⁹ It also acknowledged that the legislature had determined that under limited circumstances (such as the death of a parent), grandparents should have continuing contacts with their grandchildren's development.³⁰ Relying on the "best interests of the child" language in section 48-2B-1 of the West Virginia Code and case law involving identical facts from New Jersey and Ohio, the West Virginia court reasoned that the legislature did not intend to permit grandparent visitation rights to be frustrated by adoption.³¹ Accordingly, the court held that the adoption would not affect the visitation rights of the grandparents if such continued visitation is in the best interests of the child.³²

24. *Id.* at 209.

25. *Id.*

26. *Id.*

27. *Id.* at 210.

28. 359 S.E.2d 587 (W. Va. 1987).

29. *Id.* at 590.

30. *Id.* at 592.

31. *Id.* at 590-92 (citing *Mimkon v. Ford*, 332 A.2d 199 (N.J. 1975); *Graziano v. Davis*, 361 N.E.2d 525 (Ohio Ct. App. 1976); *Chavis v. Witt*, 328 S.E.2d 74 (S.C. 1985)).

32. *Id.* at 588.

Because of the narrow scope of these cases, they are of limited usefulness in interpreting the new statute. With the exception of *In re Nearhoof*, the court did not even consider many of the prevailing public policy views as to grandparent visitation. As a result, it was up to the legislature to update the law to conform with current changes in societal structure.

C. *Prior Attempts To Expand Grandparent Visitation Rights*

After these judicial decisions, the West Virginia Legislature responded by proposing several new bills concerning grandparent visitation rights. The first bills introduced were very liberal. In the 1987 session of the legislature, Delegates Neal and Otte introduced House Bill 2029, which stated in pertinent part:

The circuit court, upon verified petition thereto by a grandparent seeking visitation rights with grandchildren of the petitioner, shall grant the grandparent such reasonable visitation rights with said grandchild or grandchildren as the court may deem proper and in the best interest of the child or children regardless of the marital status of the parents of the child or the relationship of the grandparents to the person having custody of the child.³³

This provision was far too broad and was ultimately defeated. The same bill was introduced in 1988,³⁴ but again failed to pass.

Finally, in 1992 when the Senate received the text of House Bill 2029,³⁵ it narrowed the bill's scope. The amended version of the bill (Senate Bill 36) was subsequently enacted and is codified at sections one through nine of the Article 2B, Chapter 48 of the West Virginia Code. Although this statute is an improvement over prior law, it falls short of its goal of equitable treatment of grandparents in child custody disputes.

33. LEGISLATIVE COUNCIL OF WEST VIRGINIA, COMMITTEE ON THE JUDICIARY, H.B. 2029, at 1, 2 (Jan. 14, 1987).

34. LEGISLATIVE COUNCIL OF WEST VIRGINIA, HOUSE JUDICIARY ABSTRACT, H.B. 2029, at 1 (Jan. 13, 1988).

35. LEGISLATIVE COUNCIL OF WEST VIRGINIA, COMMITTEE ON THE JUDICIARY, S.B. 36, at 1 (Jan. 14, 1992).

III. THE NEW STATUTORY FRAMEWORK

The new grandparent visitation statute is consistent with the early decisions of the court. However, crucial terms within the statute are left undefined. As the disputes and resulting cases become increasingly complicated, more specific guidelines are required to inform grandparents of their legal rights and to provide guidance to the courts on the proper resolution of these difficult issues.

The new legislation eliminated the reference to grandparent visitation in section 48-2-15 of the West Virginia Code, rewriting and expanding Article 2B of Chapter 48, which now is the sole statute regarding grandparent visitation. The new statute consists of nine sections which set forth legislative findings and allow grandparent visitation in five situations.³⁶ Article 2B also sets forth criteria for the termination of visitation and establishes the offense of knowingly allowing a person precluded access to a grandchild such access. Additionally, it provides penalties for this offense and gives courts authority to impose attorney's fees and costs based on the equities of the positions asserted by the parties.³⁷

A. *Discussion of the New Statute*

Section one of the new statute sets forth the legislative findings and intent. The premise of the new law is that grandparent visitation may be authorized if it is in the best interests of the child. This is consistent with prior West Virginia case law on child visitation.³⁸

Section two addresses the question of grandparent visitation where divorce, annulment, or separate maintenance is ordered. This section includes the provisions previously set forth in section 48-2-15, while also adding the requirement that notice be given to grandparents whose child fails to appear or answer, either willingly or because his or her

36. W. VA. CODE §§ 48-2B-2 to -6 (Supp. 1992).

37. W. VA. CODE §§ 48-2B-7 to -9 (Supp. 1992).

38. *Ledsome v. Ledsome*, 301 S.E.2d 475 (W. Va. 1983); *see also Dempsey v. Dempsey*, 306 S.E.2d 230, 232 (W. Va. 1983).

whereabouts are unknown.³⁹ Under these circumstances, notice must be given to the grandparents at the time of the entry of a final order of divorce.⁴⁰ The grandparents then have thirty days to petition for grandparent visitation rights.⁴¹

Section three is new. It provides for grandparent visitation upon abandonment, abrogation, or judicial preclusion of parental visitation.⁴² Grandparents may petition for visitation rights under this section if the following conditions are present: (1) the grandparents' child is the noncustodial parent; (2) the noncustodial parent, having been granted visitation rights, refuses, fails, or is unable to avail himself or herself of the visitation rights for at least six months, has been precluded visitation rights by court order, or is an active duty member of the military stationed more than one hundred miles from West Virginia; and (3) the grandparent has been refused visitation for at least six months by the custodial parent.⁴³ These three conditions must be present before grandparent visitation rights will be granted in this situation.

Section four simply recodifies the former section 48-2B-1 which provided for grandparent visitation rights when a parent is deceased.⁴⁴ Section five governs a grandparent's visitation when a minor child has resided with the grandparent.⁴⁵ Grandparents can petition for visitation rights under this section when: (1) the grandchild has lived with the grandparents (without parents) for at least six consecutive months without significant interruption within the past two years; (2) one or both of the parents of the minor child removed the child from the grandparents' home; and (3) the grandparent is precluded visitation by the parent or parents.⁴⁶ As always, grandparent visitation rights are to

39. W. VA. CODE § 48-2B-2(b) (Supp. 1992).

40. *Id.*

41. *Id.*

42. W. VA. CODE § 48-2B-3 (Supp. 1992).

43. *Id.*

44. *See supra* text accompanying note 11.

45. W. VA. CODE § 48-2B-5 (Supp. 1992).

46. *Id.*

be determined with the best interests of the child as the primary concern.⁴⁷

Section six reflects the legislature's recognition that the grandparent visitation laws needed updating to conform with contemporary societal norms. This section provides for grandparent visitation when the parents of the grandchild are unwed and imposes three conditions that must be met before grandparents may petition the court for visitation rights.⁴⁸ First, the child of the paternal grandparent must be legally determined to be the parent of the minor child or acknowledge paternity through a sworn, notarized statement.⁴⁹ Second, the parent through whom the grandparent is related must have either been precluded visitation by court order, failed to exercise visitation for at least six months, or must be member of the military stationed more than one hundred miles from West Virginia.⁵⁰ Finally, the custodial parent must refuse the grandparent reasonable visitation.⁵¹

Section seven provides for the termination of grandparent visitation rights. This section gives any court granting visitation continuing jurisdiction to modify or terminate the visitation rights.⁵² Any "interested person" may petition for termination of grandparent visitation rights, and the courts may terminate visitation upon a presentation of clear and convincing evidence that the grandparent materially violated the terms of a visitation order.⁵³ Section eight allows the court to shift attorney's fees and costs based upon the equities of the positions as-

47. *Id.*

48. W. VA. CODE § 48-2B-6 (Supp. 1992).

49. W. VA. CODE § 48-2B-6(a)(1) (Supp. 1992).

50. W. VA. CODE § 48-2B-6(a)(2) (Supp. 1992).

51. W. VA. CODE § 48-2B-6(a)(3) (Supp. 1992).

52. W. VA. CODE § 48-2B-7(a) (Supp. 1992).

53. W. VA. CODE § 48-2B-7(b) (Supp. 1992). The full text of section seven reads:

(a) Any circuit court which grants visitation to a parent shall retain jurisdiction throughout the minority of the minor child with whom visitation is granted to modify or terminate such rights as dictated by the best interests of the minor child.

(b) A circuit court shall, based upon a petition brought by an interested person, terminate any grant of the right of grandparent visitation upon presentation of clear and convincing evidence that a grandparent granted visitation has materially violated the terms and conditions of said order of visitation.

W. VA. CODE § 48-2B-7 (Supp. 1992).

serted by the parties.⁵⁴ Finally, under section nine, violation of a visitation order by allowing a precluded person access to a child is a misdemeanor offense.⁵⁵

In deciding cases involving disputes over grandparent visitation rights, the new statute requires the courts to consider the following factors: (1) the amount of previous contact between the grandparent and the child; (2) whether such visitation would interfere with the parent-child relationship; and (3) the overall effect of grandparent visitation on the child's best interests.⁵⁶ Part three is a subjective test that should be used to take full account of the specific facts surrounding each case.

B. Implications of the New Statute

1. Issues Addressed and Anticipated

The new grandparent visitation statute is consistent with prior West Virginia law. The new statute does not overrule prior case law or the public policy expressed in the prior cases.⁵⁷ Instead, it simply expands grandparent visitation rights by dealing with some of the typical child custody disputes that arise in contemporary society.

Recognizing that many parents abandon their parental and marital responsibilities, the legislature added a grandparent notice provision in

54. Section eight states:

In an action brought under the provisions of this article, a circuit court may order payment of reasonable attorney's fees and costs based upon the equities of the positions asserted by the parties to pay such fees and costs.

W. VA. CODE § 48-2B-8 (Supp. 1992).

55. Section nine states:

Any grandparent who knowingly allows contact between the minor grandchild and a parent or other person who has been precluded visitation rights with the child by court order, shall, in addition to any other remedy under section seven of this article, be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than thirty days or fined not less than one hundred dollars nor more than one thousand dollars.

W. VA. CODE § 48-2B-9 (Supp. 1992).

56. W. VA. CODE §§ 48-2B-1 to -6 (Supp. 1992).

57. See discussion *supra* part II.

section two of the new statute.⁵⁸ By requiring notice of the divorce action be given to the grandparents of minor children of a person whose whereabouts are unknown or who fails to answer a divorce complaint, the grandparents are afforded the opportunity to give the grandchild a sense of "family." They have the chance to intercede before they lose their right to see the child. In many cases, this will provide the child with additional love and support, which he or she might have been deprived otherwise.

Today, grandparents are often needed to provide the substantive family. The role of parents and grandparents in our society has changed over the years. It is not uncommon for a parent to ask the grandparents to take care of children for an extended period of time. Problems tend to arise, however, when that parent comes back after months, or years, and takes them back. At common law, the grandparents had no standing to assert visitation rights and thus had to yield to the wishes of the parent.⁵⁹ Now, under the new statute, the legislature has provided that the courts shall, if consistent with the best interests of the child, grant reasonable visitation rights to the grandparents if the grandchild has resided with them for at least six consecutive months and was removed by a parent who now refuses to allow the grandparents to visit.⁶⁰ This provision provides a way for the grandparents to continue the close relationship that is likely to have developed while the grandchild lived with the grandparents.

Another common visitation problem results in the situation of unwed parents. Section six of the new statute grants grandparents whose son or daughter does not have custody of the child or children the right to petition for visitation themselves. If they are paternal grandparents, however, there must be a legal determination of paternity or the father must have acknowledged paternity through a sworn, notarized statement.

58. W. Va. Code § 48-2B-2(b) (Supp. 1992); *see supra* text accompanying notes 38-40.

59. *In re Nearhoof*, 577 S.E.2d 587, 590 (W. Va. 1991); *Emanuel S. v. Joseph E.*, 577 N.E.2d 27, 28 (N.Y. 1991); *Naveda v. Ahumada*, 381 So. 2d 147, 149 (Miss. 1980).

60. W. VA. CODE § 48-2B-5 (Supp. 1992).

The legislature has also recognized the vast potential for abuse of visitation rights. Any interested person may petition to terminate grandparent visitation rights.⁶¹ Also, it is a misdemeanor offense for a grandparent to allow a person precluded visitation rights to see the child.⁶² The purpose of this provision is to deter grandparents from allowing their children to see the minor child in violation of a court order.

Finally, the legislature gave the courts the discretion to shift attorney's fees in these cases based upon the equities of the positions asserted by the parties.⁶³ A party opposing visitation should think twice before doing so since frivolous opposition could result in the harsh financial penalties associated with fee shifting. Additionally, this provision encourages grandparents who are wrongfully denied visitation to apply for judicial relief.

2. Issues Not Addressed Nor Anticipated

There are four significant issues that the legislature left unanswered in the new statute. First, the statute as a whole is ambiguous. It fails to provide a mechanism to predict whether the courts will grant grandparent visitation rights in any given case. This is because the primary standard set forth in the statute, "the best interests of the child," is ambiguous. Also, the statute does not define certain key phrases such as who qualifies as "any interested person" when discussing termination of grandparent visitation rights. Second, the grandparents must petition the courts in order to receive relief. The family law master, however, is probably better situated to handle these cases. Third, a custodial parent can evade the statute simply by leaving the jurisdiction. Fourth, the statute does not address how adoption affects the status of the grandparent visitation.

The new statute mandates that a court's paramount consideration in determining grandparent visitation rights must be the "best interests

61. W. VA. CODE § 48-2B-7 (Supp. 1992).

62. W. VA. CODE § 48-2B-9 (Supp. 1992).

63. W. VA. CODE § 48-2B-8 (Supp. 1992).

of the child.”⁶⁴ However, the legislature failed to provide any guidance whatsoever as to what constitutes the “best interests of the child.” The legislature has given the courts absolute discretion in this area. Thus, the task of formulating guidelines for the lower courts to follow is left to the West Virginia Supreme Court of Appeals. As will be discussed below, other state legislation exists which provides detailed guidelines to the courts on a wide range of the intricacies involved in grandparent visitation disputes. The West Virginia’s legislature’s failure to follow suit is unfortunate because needless litigation is now required to develop uniform standards governing statewide application of the new grandparent visitation statute.

The legislature should finish the job and provide the courts with a list of factors to be used in making determinations concerning the best interests of minor children.⁶⁵ This would inform the courts of the scope of the legislative expansion of grandparent visitation rights. Also, parents and grandparents would then be able to understand what the rights of grandparents are, what test would be applied in determining those rights, and have some sense of whether the court decisions were fairly decided. This would give the judicial implementation of the grandparent visitation some much needed predictability that would eliminate many needless lawsuits that will be required under the new statute to test its boundaries. Finally, specific guidelines are required to make the consideration of the best interests of the child a reality.

Another ambiguous term is found in section seven of the new statute. Section seven states that “any interested person” may petition for termination of grandparent visitation; however, the new statute fails to define the term. The legislature or the courts will need to define the term to prevent grandparents from having to defend harassment suits.

64. W. VA. CODE § 48-2B-1 (Supp. 1992).

65. See ME. REV. STAT. ANN. tit. 19 § 1003 (West Supp. 1992) (listing ten factors for courts to consider in determining the best interests of a child); NEV. REV. STAT. ANN. § 125A.330 (Michie 1991) (listing eleven factors for consideration in child custody and visitation disputes); OHIO REV. CODE ANN. § 3109.051(D) (Anderson 1991) (listing fifteen factors for consideration in grandparent visitation disputes); VA. CODE ANN. § 20-107.2 (Michie Supp. 1992) (listing seven factors for courts to consider in child custody and visitation disputes).

The second major problem with the new statute is the requirement that the grandparents seek visitation rights through the court system. Cases filed in the circuit courts of this state are often not heard for months after filing. By the time the case is heard, the grandparents may have been effectively denied contact with their grandchild for an extended period of time. Also, nothing is to stop the custodial parent from moving to a different part of the state. If this occurs, the best interests of the child are viewed from a new perspective. For example, should the child be shipped back and forth for visits, or should the grandparents be made to visit the child at the new residence?

The courts are not well-equipped to deal with these situations. Since the new statute fails to provide specific guidelines and the case law in this area is sparse, the courts must intrude aimlessly into the private lives of the people involved in these disputes. The result will be judicial fumbling to find a solution. This process could be improved by granting jurisdiction to the family law master in these cases. Family law masters have more experience in domestic disputes and would provide for a more efficient resolution of them.

The lack of family law master jurisdiction in these cases means that the same issues brought up in the divorce proceedings must be revisited to resolve the grandparent visitation dispute. In order to determine the impact of granting grandparent visitation rights, the court will have to determine the status of the relationship between all parties involved. The only way the court can make a fair assessment of the best interests of the child is to probe into the same intricacies addressed in the divorce action. As the circuit court is not bound by the findings of the family law master, the parties would likely be subjected to the same intrusions already once experienced. This is unnecessary as well as a waste of time and financial resources for the parties and the courts.

The third major problem associated with new statute occurs in situations where the custodial parent and child move away. Jurisdictional questions may come into play. Currently, the county of residence has jurisdiction over the juvenile.⁶⁶ Thus, the grandparents may

66. W. VA. CODE § 49-5-1 (1992).

have problems enforcing a judgment pertaining to a minor child. This issue is not addressed by the statute or case law. Interstate enforcement of the new statute, of course, is also very problematic.

Finally, the new grandparent visitation statute does not address the effect of adoption upon grandparent visitation rights. In the absence of legislative guidance in this area, the courts must presume that the legislature was aware of the West Virginia Supreme Court of Appeals' decision in *In re Nearhoof*.⁶⁷ Here, the court said that adoption proceedings would not terminate the grandparents statutory visitation rights. This case interprets the old statute; however, the exact same language appears in the new statute. In the absence of legislative guidance to the contrary, stare decisis counsels adherence to *In re Nearhoof*. Thus, the grandparent visitation issue with regard to adoption in the situation of a deceased parent is resolved. However, the effect of adoption upon grandparent visitation rights in the other four circumstances encompassed in the new statute remains unanswered.⁶⁸

These problems could operate to defeat the intentions of the legislators in enacting West Virginia's new grandparent visitation statute. To prevent this from happening and to ensure that grandparents receive the equitable treatment intended by the legislature, adjustments should be made to the new statute.

IV. COMPARATIVE STATE LEGISLATION—AN AID TO STATUTORY INTERPRETATION

The statutes in other jurisdictions are of limited usefulness in interpreting West Virginia's new grandparent visitation statute. Although other states have legislation in this area, their case law is not well developed. The West Virginia Legislature considered the following state statutes drafting West Virginia's new statute.⁶⁹ An analysis

67. 359 S.E.2d 587 (W. Va. 1987).

68. See generally *Puleo v. Forgue*, 610 A.2d 124 (R.I. 1992) (holding that grandparent visitation rights survived stepparent adoption); *Muse v. Hutchins*, 559 So. 2d 1031 (Miss. 1990) (holding that paternal grandparent adoption of child following death of mother terminated maternal grandparent visitation rights); *Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989) (holding that adoption by maternal first cousin and spouse terminated paternal grandparents' visitation rights).

69. File for S.B. 36, LEGISLATIVE COUNCIL OF WEST VIRGINIA, COMMITTEE ON THE

of their legislation demonstrates that the West Virginia legislature was faced with limited guidance on this issue.

A. *Virginia*

Rather than having a special statute of grandparent visitation rights, Virginia includes grandparents in its general child custody and visitation statute. Although limited in scope, the Virginia statute sets forth criteria its courts are to use when determining whether custody or visitation is in the best interests of the child. The pertinent parts of the Virginia Code are set forth below:

In any case involving the custody or visitation of a child, the court may award custody or visitation to any party with a legitimate interest therein, including but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term "legitimate interest" shall be construed broadly to accommodate the best interests of the child

The court, in determining custody and visitation of minor children, shall consider the following:

1. The age and physical and mental condition of the child or children;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child;
4. The needs of the child or children;
5. The role which each parent has played, and will play in the future, in the upbringing and care of the child or children;
6. Any history of family abuse as defined in § 16.1-228; and
7. Such other factors as are necessary to consider the best interests of the child or children.⁷⁰

This statute was originally enacted in 1982 and has been amended twelve times.⁷¹ The General Assembly of the Commonwealth of Virginia has taken an extremely active role in protecting all aspects of child custody and visitation rights, including grandparent visitation rights. The West Virginia Legislature would be well-advised to follow

JUDICIARY (1992).

70. VA. CODE ANN. § 20-107.2 (Michie Supp. 1992).

71. *Id.*

the lead of the Virginia General Assembly and set forth, in the statute, the factors that the courts are to use in deciding disputes over grandparent visitation rights.

The case law discussing grandparent visitation rights in Virginia is limited, but it is helpful in determining what is in the "best interests of the child." In *Robinson v. Robinson*,⁷² the Court of Appeals of Virginia held that it is reversible error for the trial judge to fail to consider the statutory factors when fixing visitation rights.⁷³ The Supreme Court of Virginia, in *Roe v. Roe*,⁷⁴ held that a child's best interests are not promoted by an award of custody to a parent who carries on an active homosexual relationship in the same residence as the child, and that such an award constitutes an abuse of judicial discretion.⁷⁵

The only Virginia case directly discussing visitation rights, *Kogon v. Ulerick*,⁷⁶ involved a jurisdictional question and did not consider grandparent visitation. The issue before the court in *Kogon* was whether a man, not married to the mother, previously thought to be the father of a child but later determined not to be the father, could petition for visitation rights.⁷⁷ The court held that Virginia Code did not grant him standing to petition for visitation rights.⁷⁸

Even though it is not illuminated by relevant case law, the Virginia statute is a useful indicator of what are the crucial considerations in determining the best interests of a child. The West Virginia statute could be improved by including the factors as listed in the Virginia statute, as well as stating, as the Court of Appeals of Virginia has held, that failure to use the statutory factors is reversible error.⁷⁹ Alternatively, the West Virginia Supreme Court of Appeals could judicially adopt these factors as specific guidelines in determinations of what are

72. *Robinson v. Robinson*, 361 S.E.2d 356 (Va. Ct. App. 1987).

73. *Id.* at 358-89.

74. *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).

75. *Id.* at 692-94.

76. 405 S.E.2d 441 (Va. 1991).

77. *Id.* at 442.

78. *Id.* at 442-43.

79. *Robinson v. Robinson*, 361 S.E.2d 356, 358-59 (Va. Ct. App. 1985).

a child's best interests in disputes concerning grandparent visitation rights.

B. Pennsylvania

West Virginia's new statute is very similar to Pennsylvania's grandparent visitation statute.⁸⁰ The Pennsylvania statute provides for grandparent visitation when the parent is deceased,⁸¹ when the parents are divorced or separated,⁸² or when the child has resided with the grandparents.⁸³ Like the West Virginia's statute, the Pennsylvania statute focuses the visitation determination on the best interests of the child. Finally, unlike West Virginia's statute, the effect of adoption upon the grandparent visitation rights is addressed in Pennsylvania's statute.⁸⁴

Section 5311 of the Pennsylvania Consolidated Statutes pertains to when the parent is deceased. It states:

If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and child prior to the application.⁸⁵

This section is similar to the corresponding section in the West Virginia Code.⁸⁶ However, the Pennsylvania statute provides the courts with a little more guidance in what factors are relevant to determinations of grandparent visitation rights.

80. 23 PA. CONS. STAT. §§ 5311-5314 (1991).

81. 23 PA. CONS. STAT. § 5311 (1991).

82. 23 PA. CONS. STAT. § 5312 (1991).

83. 23 PA. CONS. STAT. § 5313 (1991).

84. 23 PA. CONS. STAT. § 5314 (1991).

85. 23 PA. CONS. STAT. § 5311 (1991).

86. W. VA. CODE § 48-2B-4 (Supp. 1992).

On the other hand, the next section,⁸⁷ concerning visitation when the parents are divorced or separated, is very different from the corresponding West Virginia provision.⁸⁸ The Pennsylvania statute states:

In all proceedings for dissolution, subsequent to the commencement of the proceeding and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.⁸⁹

Unlike the Pennsylvania statute, the West Virginia statute contains a prerequisite: the grandparent cannot petition for visitation unless the parent's whereabouts are unknown or the parent fails to defend the divorce action.⁹⁰ Additionally, in this situation, the West Virginia statute requires that the grandparents receive notice of the final divorce decree.⁹¹ Thus, the West Virginia statute is stricter than Pennsylvania's statute on this matter.

The next section of the Pennsylvania statute,⁹² which deals with the situation where the child has resided with the grandparents, differs with the West Virginia statute only in regard to the time of residence requirement.⁹³ Pennsylvania's statute requires that the child reside with the grandparents for one year or more, while West Virginia only requires six months.

Finally, unlike the West Virginia statute, the Pennsylvania statute directly addresses the effect of adoption upon grandparent visitation rights.⁹⁴ The Pennsylvania statute states:

87. 23 PA. CONS. STAT. § 5312 (1991).

88. W. VA. CODE § 48-2B-2 (Supp. 1992).

89. 23 PA. CONS. STAT. § 5312 (1991).

90. W. VA. CODE § 48-2B-2(1) & (2) (Supp. 1992).

91. W. VA. CODE § 48-2B-2(2)(b) (Supp. 1992).

92. 23 PA. CONS. STAT. § 5313 (1991).

93. W. VA. CODE § 48-2B-5 (Supp. 1992).

94. 23 PA. CONS. STAT. § 5314 (1991).

Sections 5311 (relating to when parent deceased), 5312 (relating to when parents' marriage dissolved or parents are separated) and 5313 (relating to when child has resided with grandparents) shall not apply if the child has been adopted by a person other than a stepparent or grandparent. Any visitation rights granted pursuant to this section prior to the adoption of the child shall be automatically terminated upon such adoption.⁹⁵

This section states unequivocally that the visitation rights must terminate if the child is adopted by someone other than a stepparent or grandparent. This provision is counter to West Virginia case law which states that adoption does not automatically cut off grandparent visitation rights when a parent is deceased.⁹⁶

Unlike the other states examined, Pennsylvania has case law that serves as useful guidance to interpretation of its statute. These cases make definitive statements concerning the "best interests of the child" under the Pennsylvania statute. In *Hughes v. Hughes*,⁹⁷ the Pennsylvania Superior Court held that granting visitation rights would not be in the best interests of the child where the paternal grandmother formerly lacked interest and there was great bitterness between the paternal grandmother and the child's divorced mother. Later, in *Ritter v. Ritter*,⁹⁸ the Pennsylvania District & County Court held that where the likelihood of benefit from a child's acquaintance with her paternal grandparents far outweighs any possible detriment based on a dispute, the grandparents are to be granted visitation. Finally, in *Bucci v. Bucci*,⁹⁹ the Pennsylvania Superior Court expanded its analysis, finding that it was in the child's best interests to grant visitation rights to the grandparents even though they had failed to contact the child for four years. The court's conclusion focused on the fact that the grandparents' four-year absence was based on their desire not to exacerbate the problems between the custodial and noncustodial parent and to avoid quarrels with the custodial parent. The court also emphasized

95. *Id.*

96. *In re Nearhoof*, 359 S.E.2d 587, 592 (W. Va. 1987).

97. 463 A.2d 478 (Pa. Super. Ct. 1983).

98. 36 Pa. D. & C.3d 556 (1985).

99. 506 A.2d 438 (Pa. Super. Ct. 1986).

that the burden of proof was on the grandparents to show that visitation was in the child's best interest.

Due to the similarity of the statutes and their focus on the best interests of the child, Pennsylvania case law is helpful in predicting how the West Virginia Supreme Court of Appeals will apply the new statute. These Pennsylvania cases are likely to be persuasive to the West Virginia court; thus, West Virginia lawyers must confront these cases regardless of the position taken on these issues.

C. Maryland

The Maryland statute relating to grandparent visitation rights is narrow.¹⁰⁰ In Maryland, grandparents may petition for visitation any time after the termination of marriage.¹⁰¹ A court of equity may, "(1) consider a petition for reasonable visitation by a grandparent of a natural or adopted child of the parties whose marriage has been terminated, and (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent."¹⁰² In a special revisor's note, the Commission to Revise the Annotated Code observes that the General Assembly may wish to expand these rights to include situations where the parents were never married, or where the marriage has been annulled.¹⁰³

Like Virginia, Maryland has very limited case law interpreting this statute. In *L.F.M. v. Department of Social Services*,¹⁰⁴ the Special Court of Appeals of Maryland held that after termination of parental rights and placement of children into a confidential adoptive home, the grandparents had no right to visit children over objection of the confidential adoptive parents.¹⁰⁵ The court surveyed the law of all fifty states and found that forty-nine states had enacted statutes which visi-

100. MD. CODE ANN., FAM. LAW § 9-102 (1991).

101. *Id.*

102. *Id.*

103. *Id.*

104. 507 A.2d 1151 (Md. Ct. Spec. App. 1986).

105. *Id.* at 1158-60.

tation rights to grandparents in certain situations.¹⁰⁶ However, the court found that not one state statute explicitly authorized grandparent visitation following “the termination of natural parental rights and an adoption by strangers.”¹⁰⁷

Once again, the usefulness of the comparison statute and its associated case law is limited. Maryland’s statute, like West Virginia’s does not provide specific guidance to the courts in determining disputes over grandparent visitation rights. However, the case law does indicate that West Virginia needs to rethink its position on the effect of adoption upon grandparent visitation rights.¹⁰⁸

V. CONCLUSION

Because the American family is evolving, our family law must be updated to reflect the changes in society. West Virginia’s enactment of a new grandparent visitation statute is an important step in this process. This new statute expands grandparents legal standing to seek judicial enforcement of visitation rights in more situations than allowed under prior law.

The new statute includes five situations in which grandparents can petition for visitation: (1) where divorce or separate maintenance is ordered;¹⁰⁹ (2) upon abandonment or abrogation of visitation rights by a parent or the judicial preclusion of such;¹¹⁰ (3) when a parent is deceased;¹¹¹ (4) when a minor child has resided with the grandparents;¹¹² and (5) where the parents are unwed.¹¹³ The new statute also provides for termination of visitation,¹¹⁴ attorney’s fees,¹¹⁵ and

106. *Id.* at 1159 & n.14.

107. *Id.* at 1160.

108. *See supra* text accompanying notes 67-68.

109. W. VA. CODE § 48-2B-2 (Supp. 1992).

110. W. VA. CODE § 48-2B-3 (Supp. 1992).

111. W. VA. CODE § 48-2B-4 (Supp. 1992).

112. W. VA. CODE § 48-2B-5 (Supp. 1992).

113. W. VA. CODE § 48-2B-6 (Supp. 1992).

114. W. VA. CODE § 48-2B-7 (Supp. 1992).

115. W. VA. CODE § 48-2B-8 (Supp. 1992).

penalties for violation of visitation orders.¹¹⁶ Under the new statute, the minor child's best interests are paramount.

The legislature has recognized that many parents do not take responsibility for their children. Some parents abandon their spouses and children while others fail to exercise their visitation rights following divorce. In these situations, the new legislation allows interested grandparents to foster a meaningful relationship with their grandchild.¹¹⁷ The legislature also recognized the unfairness of precluding visitation to grandparents who have raised their grandchildren after the parents have decided to take them back. The new statute grants these grandparents a cause of action and requires a court to grant visitation when it is in the minor child's best interests.¹¹⁸ The grandparents are now afforded the opportunity to maintain a relationship with their grandchild in these situations.

Although the new statute is an improvement, four important problems remain. First, its provisions and terms are ambiguous, especially the reoccurring clause that requires the court to consider best interests of the minor child. Specific guidance is needed. Second, the grandparents must petition the courts in order to be granted visitation. This is both inefficient and inequitable. The parents, grandparents, and minor children should not be forced to suffer through two legal proceedings unnecessarily to resolve the issues surrounding a divorce. Divorce, custody, and all visitation issues are best resolved at one proceeding. Third, if the custodial parent leaves the jurisdiction, enforcement of grandparent visitation rights is problematic. Finally, the statute does not indicate what effect adoption should have on the grandparents' visitation.

Of the other state statutes addressing this problem, only the Virginia, Maine, Nevada, and Ohio statutes set forth the criteria the court is to consider when determining what is in the best interests of the minor child. As well as generally having narrow statutes, most of these

116. W. VA. CODE § 48-2B-9 (Supp. 1992).

117. W. VA. CODE §§ 48-2B-2, 48-2B-3 (Supp. 1992).

118. W. VA. CODE § 48-2B-5(b) (Supp. 1992).

states also have very limited case law interpreting them, with Pennsylvania as one relevant exception.

Pennsylvania not only has a broader statute, but also case law that is likely to influence the West Virginia Supreme Court of Appeals in cases involving grandparent visitation rights. This is primarily because the statutes found in both states are very similar. In West Virginia cases, lawyers on both sides of the issues will need to address these Pennsylvania decisions.

In conclusion, the new grandparent visitation statute enacted during the term of 1992 is a step in the right direction. However, the statute leaves many gaps and these important issues must be resolved before the ultimate goal of fair treatment of grandparents is realized.

Michelle M. Price

